IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

—v.—

MIDWEST VIDEO CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; AND BRIEF *AMICUS CURIAE*

MELVIN L. WULF
LAWRENCE G. SAGER
SCOTT ROBB
RONALD S. REICH
American Civil Liberties Union Foundation
156 Fifth Ave.
New York, N. Y. 10010

Attorneys for Amicus

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

—v.—

MIDWEST VIDEO CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION TO FILE BRIEF *AMICUS CURIAE*

The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in this case.

Throughout its 50 year history, the American Civil Liberties Union has been deeply committed to the ideal of free and open expression which is embodied in the First Amendment to the Constitution of the United States.

For some time it has been apparent that, while the broadcasting media present great potential for the realization of this ideal, they have developed in ways which fall drastically short of a realization of that potential.

The advent of cable carrier technology presents a renewed opportunity to create a system of mass communications available to all who wish to speak and to all who wish to hear. We are deeply concerned that governmental involvement in this new communications technology promote rather than retard the fruition of such a system. Our brief is addressed to what we regard as the disservice to this end effectuated by the Order of the Federal Communications Commission which is the object of this case.

For these reasons, we respectfully request leave to file the within brief *amicus curiae*.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

—v.—

MIDWEST VIDEO CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE*

Interest of *Amicus*

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

Question Presented

This brief is addressed solely to the issue of whether the program origination requirement promulgated by the Federal Communications Commission in 20 F.C.C.2d 201, is in furtherance of the Commission's statutory and constitutional mandate.

ARGUMENT

The Program Origination Requirement Restricts Rather Than Promotes the Constitutional Interest in Free Expression Upon Which the Federal Communications Commission's Regulatory Authority Is Founded and by Which That Authority Is Limited.

The Federal Communications Commission Memorandum Opinion and Order adopted October 27, 1969, 20 F.C.C.2d 201, requiring program origination by cable operators having 3,500 or more subscribers, must be judged in light of its tendency to promote or inhibit exercise of the First Amendment freedoms of speech and the press. The F.C.C. can not be permitted to accomplish by indirection, or misapprehension and mistake, what it is forbidden to accomplish directly by the Constitution and by the enabling legislation (Communications Act of 1934, 47 U.S.C. 151, 35 *et seq.*) to which it owes its existence.

A. *The Regulatory Authority of the F.C.C. Is Founded Upon and Limited by First Amendment Concerns of Free Expression.*

Under Section 326 of the Communications Act of 1934, 47 U.S.C. §326, the Federal Communications Commission is specifically enjoined from adopting or promulgating any "regulation or condition which shall interfere with the right of free speech by means of radio communication." Section 303(g) of the same Act, 47 U.S.C. §303(g), affirmatively directs the Commission to "encourage the larger and more effective use of radio in the public interest." And as this Court stated in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969):

> It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail rather than to countenance monopolization of that market whether it be by the government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the F.C.C. 395 U.S. at 390.

Shortly after its creation with the mandate act in response to the public "convenience, interest or necessity" (Radio Act of 1927, §4, 44 Stat. §63), the Commission itself declared that the "public interest requires ample play for the free and fair competition of opposing views." *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929).

In our era, the development and regulation of the electronic media have an extraordinarily important impact upon the realization or frustration of the concerns addressed by the First Amendment guarantees of freedom of speech and the press. Those guarantees rest "on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). They go " . . . to the heart of the natural right of members of an organized society, united for their common good to impart and acquire information about their common interests." *Grosjean* v. *American Press*, 297 U.S. 233, 243 (1936). Free access to the media of Communications is essential if these concerns are to be realized.

In colonial and post-revolutionary days, until the advent of telephonic communication late in the Nineteenth Century, access to the media of communications implied the freedom to speak to one's neighbors in the local town hall, or in the village square. These and other areas were preserved as arenas for controversy, and access was guaranteed to all ". . . for the communication of thought and discussion of public questions immemorially associated with resort to public places." *Cox* v. *New Hampshire,* 312 U.S. 569, 61 S. Ct. 762, 765 (1941); see also, *Guyot* v. *Pierce,* 372 F.2d 658, 661 (5th Cir. 1967), and *University Committee to End the War in Vietnam* v. *Gunn,* 289 F. Supp. 469, 477 (C.W.D. Tex., 1968), *aff.* 399 U.S. 383, 90 S. Ct. 2013 (1970). Streets, sidewalks and other similar places "are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Amalgamated Food Employees Union* v. *Logan Valley Plaza Inc.,* 391 U.S. 308, 20 L. ed.2d 603, at 610 (1968); see also, *Marsh* v. *Alabama,* 326 U.S. 501 (1946).

In the Twentieth Century it is apparent that older modes of communication—public speech, newspapers, mail—are increasingly inadequate fully to serve the needs of the American people. Unamplified public speech can reach a few hundred people, but not the millions who inhabit our cities and rural areas. Newspapers and magazines which from the middle of the Nineteenth Century until the last few decades constituted our major media of mass communications face ever-increasing difficulty in maintaining their audiences which have in significant numbers turned

to radio and television as substitutes. The town halls and squares of Post-revolutionary America have been largely replaced, functionally, by small screens ensconced in the living rooms of most American homes.[1] Television today is the central public forum of our people and nation. That forum—at least to the extent of governmental involvement in its evolution—must be structured to facilitate the aims of the First Amendment, both as a matter of individual right and of national necessity.

B. *The Program Origination Requirement Disserves the Commission's Constitutional and Statutory Mandate to Maximize the Opportunity for Free Expression Through the Electronic Media.*

1. The Program Origination Requirement Perpetuates Governmental Regulation of Content in a Medium Where Such Regulation Is Not Justified by the Exigencies of Scarcity.

The history of the regulation of radio and television broadcasting in the United States reflects a concerted effort to achieve the widest and fairest possible use of the limited resource known as the electromagnetic spectrum. The Radio Act of 1927 (Public Law 632, 69th Congress) and the Communications Act of 1934 (47 U.S.C. §§151 *et seq.*) clearly reflect this primary congressional concern. Judicial consideration of the broadcast media has likewise reflected this awareness: "[Broadcast] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody." *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 214 (1943).

[1] In excess of 95% of American homes have access to television. See, "Telestatus Report," *Broadcasting* 63-66 (December 28, 1970).

The result of the highly restrictive capacity of the electromagnetic spectrum upon which the broadcast media rely has been an acute tension between the end of minimizing governmental interference with the scope and content of broadcast media programming and the end of insuring some freedom of public access to the necessarily limited resources of those media. Thus, while the F.C.C. has generally exercised its regulatory powers with restraint, it has engaged in the regulation of program content in order to insure that those who have been granted monopoly control over various segments of the public airways do not completely restrict the access of various persons, groups or ideas to those airways. The Fairness Doctrine, of course, is a prominent example of such a resolution between competing aspects of the social interest in free expression. See *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra*.

Cable technology, unlike radio and television broadcasting, does not carry with it this inherent tension between governmental regulation of program content and private restriction of program content. While the number of separate radio or television transmissions which can be distributed and received in any given area through the medium of the electromagnetic spectrum is drastically limited by the phenomenon of "interference," there is no limit to the number of discreet signals which can be distributed and received by cable. Thus, in a city like New York—where there are presently only seven television broadcast channels utilizing the Very High Frequency spectrum and a relatively small number of channels utilizing the Ultra High Frequency spectrum (which has a shorter range and technically inferior signal)—it is technically and economically possible to sustain a virtually un-

limited variety of program and information services utilizing the low-cost and infinitely expandable capacity of cable transmission.[2] If the transmission capacity of cable is realized to a substantial degree, and if access to that capacity is not artificially restricted, free expression will flourish.

The place of governmental regulation of a medium like cable is that of insuring capacity appropriate to social needs and access to that capacity at reasonable rates by all interested communicators. In other words, cable systems could and should be regulated as common carriers.[3]

---

[2] "Broadband cable" is composed of numerous channels or communications paths of varying frequencies capable of transmitting electrical communications. Because of the wide range of frequencies available for data transmission, a single cable can carry a variety of signals for different uses. Among the present uses of broadband cable are CATV transmissions, reproduction of documents and photographs, telegraph, telephoto, remote metering and the like. See *American Trucking Associations, Inc.* v. *F. C. C.*, 377 F.2d 121, 8 R.R.2d 2026 (D.C. Cir. 1966). In Akron, Ohio, a cable system with an 82 channel capacity is now in operation. In the appendix to this brief, your *amicus* has collected authorities which detail the economic and technical feasibility of fully articulated cable systems.

[3] The early, judicially supported view of the Commission was that "Community Antenna Television" Systems (CATV) were not common carriers within the meaning of Title II of the Communications Act, 47 U.S.C. §§201-222. See, e.g., *Philadelphia Television Broadcasting Co.* v. *F. C. C.*, 359 F.2d 282 (1966). But this view was predicated upon cable technology in its infancy, and involved an assessment of "systems generally . . . designed to receive a broadcast television signal at a favorable point of reception . . . where the system's receiving antenna is situated." *Frontier Broadcasting Co.* v. *Collier*, 24 F.C.C. 251, 16 R.R. 1005 (1958). But the Commission itself has acknowledged that cable technology has undergone a radical change and requires drastic adjustment of regulatory perspective. "It now appears" the Commission has noted, that "cable technology may be on the verge of expanding system capacity to 20 or more channels, and that a variety of new services to the public are envisioned." *Notice of Proposed Rule-*

But there is no need and no justification for governmental regulation of content in such a medium. Far from promoting free expression, the program origination requirement will inspire its restriction by the cable industry as will be explained below.

The origination requirement sets a precedent for governmental regulation of content in a medium which does not possess the characteristics which justify such regulation of the broadcast media. Moreover—if your *Amicus* is correct in its well-supported belief that the origination requirement will promote the private contraction of the cable medium—the requirement will indirectly spawn much more substantial governmental involvement in the content of cable systems. For, if the cable industry is encouraged to develop along the restricted lines of the broadcast industry, the same considerations which have prompted detailed

---

making and Notice of Inquiry, 15 F.C.C.2d 417, 418. See note 2, *supra.*

Present cable technology fully justifies Commission authority to regulate cable operators as common carriers under Title II. "Common carrier" is defined for purposes of that title as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. §153(b). Persons engaged in "radio broadcasting" are excepted from the status of "common carrier," but cable carriage is clearly not broadcasting in this sense, 47 U.S.C. §§153(b) and (o); see *Cable Vision, Inc.* v. *KVTV, Inc.*, 211 F. Supp. 47 (D.C. Idaho 1962), *vac. and remanded on other grounds,* 355 F.2d 398, *cert. den.* 379 U.S. 989.

Ample precedent for treating broadband cable operators as common carriers is provided by Commission regulation of Telephone Companies which provide cable channel distribution facilities. See *General Telephone Co. of California* v. *F. C. C.*, 413 F.2d 390 (D.C. Cir. 1969), *cert. den.* 396 U.S. 888 and *General Telephone Co. of the Southwest* v. *U. S.*, —— F.2d ——, 22 R.R.2d 2179. In the latter case the Fifth Circuit Court of Appeals expressly reserved the question of "whether broadband cable services should evolve in a common carrier mode." 22 R.R.2d at 2181.

F.C.C. involvement in program content vis-a-vis broadcasting will come to prevail in the cable field.

2. The Program Origination Requirement Will Encourage the Cable Industry to Restrict the Opportunity for Free Expression.

If the cable industry is required—or even permitted—to enter the arena of program origination, there will be powerful economic incentives against its realizing the full technological advantages of cable as a carrier of diverse content and myriad educational and commercial services. This sad prognosis is confirmed by the history of American television broadcasting.

Television broadcasters derive their revenue from the selling of audiences to sponsors. The larger the audience they can deliver (by virtue either of presenting particularly popular programming, or operating in restricted television markets), the more they can demand and receive from sponsors who wish to advertise their goods and services. If cable carriers are required to enter the field of programming, they, like television broadcasters, will seek to preserve the largest possible audiences for themselves in the knowledge that advertising sponsors will pay them at a rate reflecting the number of viewers they deliver. Cable carriers will be unwilling to expand their carrier capacity to meet the demands of others when the effect of that expansion will be to reduce the audience for their own programs. The program origination requirement will, moreover, entail the diversion of cable companies' talent and capital resources which would otherwise be employed to the end of increased carriage capacity. Funds and personnel will be deflected to the acquisition of studio space, theatrical paraphernalia, production staff, and so on.

The program origination order of the FCC thus effectively constitutes a mandate to the cable industry to integrate programming and distribution functions along the pattern adopted by television broadcasters. Not only will program-originating cable operators be inspired to restrict their carrier capacity, they will also be discouraged from airing independently produced programs of interest to diverse segments of their viewing audience. As programmers, cable carriers will be in the business of selling audiences to sponsors at the lowest possible cost to themselves. They attempt to gain the largest audience for themselves[4] by seeking to distribute the kinds of mass entertainment programs which can capture it, and they will naturally seek to maximize their profits from such programming by producing their own shows. This diversity-inhibiting effect of the vertical integration of the programming and distribution functions has been amply demonstrated in the development of network programming. See, for example, the FCC Report and Order released on May 7, 1970 (re Amendment of Part 73 of the Commission's Rules and Regulations Dkt. No. 12782), determining that ABC and CBS each had important financial interests in more than 96% of all evening (6:00-11:00 P.M.) entertainment programming, other than feature films, carried on their networks.

It is clear that integration of the programming and distribution functions leads to diminished diversity in pro-

[4] For the tendency of broadcasters to maximize their audiences by serving modal tastes, see Peter Steiner, "Program Patterns and the Workability of Competition in Radio Broadcasting," *Quarterly Journal of Economics,* LXVI (May 1952); Jerome Rothenberg, "Consumer Sovereignty and the Economics of TV Programming," *Studies in Public Communications* (Fall 1962).

gramming as control is concentrated in the hands of those whose primary corporate responsibility is to select commercially saleable material which promises to capture the largest possible audience in each viewing hour. Equally clear is the fact that access to the medium of television is increasingly denied those program producers who are not in some way affiliated with the distributor. The anti-competitive integration of the programming and distribution functions thus tends to deprive the public of a rich diversity of ideas and views which could otherwise be available to it.[5]

---

[5] It is worth noting that Anti-Trust legislation, designed to promote the free flow of goods, services, and ideas, has historically been concerned not only with those arrangements which actually inhibit competition, but also with arrangements which merely tend, or could tend to diminish it. Thus, in *United States* v. *Terminal Railroad Ass'n.*, 224 U.S. 383 (1912), the Court refused to sustain an agreement in the form of a corporate charter under which six of twenty-four railroad companies operating in the St. Louis metropolitan region maintained exclusive control of the bridge and ferry routes out of the city. The Court's concern at the anti-competitive *potential* of the arrangement allowed it to reach this result while acknowledging that "the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies . . . " 224 U.S. 383, at 389. See also, *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, (1930), in which the Court, while noting that the fundamental interest protected by the Sherman Anti-Trust Act was that of "the public in the preservation of competition . . . " denied that the Act required a showing "that the challenged arrangement suppresses all competition. . . . " 282 U.S. 30, at 34.

In *United States* v. *Paramount Pictures Inc.*, 334 U.S. 131 (1948), the Court was specifically concerned at the anti-competitive effect of ownership by movie producers in theatres which could exhibit their films. It affirmed the order of the District Court under which producers were required to divest themselves of interests in exhibiting theatres where such interests were prima facie, or in intent and effect, anti-competitive.

CONCLUSION

The Commission's program origination requirement reflects a regulatory policy which is inconsistent with the nature and potential of emerging broadband cable technology. The requirement will serve to inhibit the potential of that technology to provide an important outlet for the free expression of ideas. For this reason, its issuance was without the statutory and constitutional authority of the Commission, and accordingly, the decision below should be affirmed.

Respectfully submitted,

MELVIN L. WULF
LAWRENCE G. SAGER
SCOTT ROBB
RONALD S. REICH
American Civil Liberties Union Foundation
156 Fifth Ave.
New York, N. Y. 10010

Attorneys for Amicus*

* Attorneys for *Amicus* gratefully acknowledge the assistance of Gerald McFarren, who is a third year student at the School of Law, Columbia University.

APPENDIX

Sources on the Technological and Economic Feasibility of Broad Band Communications Systems

1. "Hitches in the Cable"—Sidney W. Dean, Jr., *The Nation,* July 20, 1970, pp. 41-45.

2. "Cable TV Leaps Into The Big Time," *Business Week,* Special Report: November 22, 1969.

3. "On the Economics of Wired City Television," *The American Economic Review,* H. F. Barnett and E. Greenberg, pp. 503-508.

4. "Public Policy and Emerging Technology in the Media." Bruce M. Owen, J.F.K. School of Government, Harvard University, Summer 1970.

5. "The Wired Nation," Ralph Lee Smith, *The Nation,* Special Issue, May 18, 1970.

6. *National Businessman's Council,* Testimony on 6700-A in Assembly, N.Y. (An Act . . . in relation to the creation of a state commission on cable television . . .), July 8, 1970.

7. "Toward a Modest Experiment in Cable Television," Stephen White, *The Public Interest,* ; pp. 52-66.

8. A Proposal for Wired City Television," Harold F. Barnett and Edward Greenberg, *Washington University Law Quarterly,* Vo. 1968, Winter 1968, No. 1, pp. 1-26.

9. "Regulation of Community Antenna Television," *Columbia Law Review*, Vol. 70, May 1970, No. 5, pp. 837-875.

10. Public Services Commission State of New York, Report of December 1970 on "Regulation of Cable Television by the State of New York," especially at 219.

11. Electronic Industries Association: Industrial Electronics Division Response to 2CC Docket 18397, part V, October 27, 1969.